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DECISION



Mr. Has [unclear] [unclear]
Room 7109

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-187113

DATE: November 24, 1976

MATTER OF: Fordel Films Incorporated

DIGEST:

Although activity inadvertently and improperly conducted negotiations with low offeror, since award was made in good faith, agency actions were not arbitrary or capricious and contract has been 75 percent completed, no corrective action will be taken by GAO, and claim for proposal preparation costs will not be considered.

Fordel Films Incorporated (Fordel) protests the award of a contract by the Naval Regional Procurement Office, Washington Navy Yard, to a firm other than itself under request for proposals No. N00600-76-R-5377 for the production of a motion picture.

Fourteen proposals, each with a fixed-price offer and a cost breakdown, were received by the April 23, 1976, closing date. The eventual awardee, Production House, Inc., submitted an original offer of \$22,850, which was reduced to \$19,940 by a properly submitted and timely received modification to its original offer. In a telephone conversation of April 26 the procurement activity requested Production House to explain the price reductions made in its modification, thereby leading to the submission of an April 26 letter by Production House wherein its offer was further reduced to \$19,747. Subsequently, because the solicitation had advised that the "Fee * * * shall not be applied to travel and subsistence in the estimating of total costs," the revised price was further reduced in a telephone conversation to \$19,345. While efforts were underway to determine if Production House was a responsible offeror, Fordel, the second low offeror, was requested by telephone to confirm its \$21,289 price so that a prompt award could be made to it should Production House be found nonresponsible. According to the contracting activity, Fordel acknowledged the omission of certain costs in its offer but confirmed its offered price. Award was made to Production House at a price of \$19,345 on April 29 after it had been found to be responsible.

B-187113

The contracting activity now admits that the procurement was not conducted in a proper manner. It is stated that at the time the telephone conversations occurred with these two firms neither the negotiator nor the contracting officer viewed the conversations as negotiations, but rather as corrections and clarifications which did not require requests for best and final offers. It is now believed that these discussions did in fact constitute negotiations with Production House, that best and final offers should have been requested from both firms, and that award should not have been made without requesting such offers. Notwithstanding these defects in the negotiations it is recommended that the award be upheld, since the award was made in good faith to the lowest-priced offeror, since Fordel was given the opportunity to reduce its price and allegedly did not reduce it, and since it is not in the best interest of the Government to change contractors as the contract has been 75 percent completed.

Fordel in its original letter of protest to our Office alleged that all price reductions made by Production House after the submission of its original \$22,850 offer were submitted by telephone, contrary to the solicitation requirements, and that it should have thus received award at its offer of \$21,289. From the administrative report to our Office it appears that the Production House revised price of \$19,940 was submitted properly and timely by letter of April 20. Now, in reply to that administrative report, Fordel further alleges that it offered, when requested by the contracting officer to confirm its price, to reduce its price to just over \$19,200. Such would, of course, have made it the low offeror.

With regard to the latter point, since there is no evidence other than the conflicting statements of the protester and agency as to the import of the conversation, we are unable to accept the protester's contention that it offered a price reduction. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Furthermore, we find it reasonable to believe that the activity personnel conducting the procurement did in good faith look upon its telephone conversations as merely attempts to clarify possible computational mistakes made in already existing offers rather than as negotiations seeking to arrive at the lowest price obtainable. Further, since

B-187113

the present contract with Production House has been 75 percent--or substantially--completed it would not be in the best interest of the Government to disturb the award.

Thus, while the procedures employed in making the award were defective, no corrective action will be taken by our Office.

Finally, Fordel has expressed the view that it is entitled to an unspecified amount for proposal preparation costs. Since we do not believe the record establishes that the agency acted arbitrarily or capriciously toward Fordel, the standard for such recovery has not been met. National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192.

Deputy

By K. L. H.
Comptroller General
of the United States